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SPEAKERS

Sam Gedge, Anthony Sanders, Bob Belden

A Anthony Sanders 00:00

"En banc and bank or on bach, law French on the bench, adverb and adjective with all judges present and participating in full court. The court heard the case en banc. And en banc rehearing, also spelled INBANC, or INBANK, also termed in Bonco." Well, that was a reading from one of my favorite story books, Black's Law Dictionary, Seventh Edition, with the Editor in Chief being Bryan Garner. That was the term en banc, or as some people say, in bank. And we're going to be talking about some en banc cases, and the history of the word en banc or words and how you pronounce that thing. Anyway, today on Short Circuit, your podcasts 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 Friday, February 10 2023. And today's episode is a reunion of sorts and encore, to use the terminology of the day with a couple of my colleagues. And we'll get into the history there and this on bunk stuff in a little bit. But first, I have a few announcements for folks about what's coming up at the Institute for Justice and the Center for Judicial Engagement. We have a very busy calendar right now. But most importantly, most immediately, for people in the Cleveland area. So are fans in Ohio, around Northern Ohio, around Cleveland, you have a couple opportunities to come and engage with some of us at IJ. And this is related to a case that we have pending at the US Supreme Court, which I think is going to conference in just a week. It is called Novak v. Parma. We've actually talked about it a couple of times on Short Circuit, but it's more commonly known these days as the The Onion amicus brief case. So you may remember a few months ago, The Onion filed an amicus brief in a for a cert petition at the US Supreme Court, it got a lot of play. It was super funny. It actually was an IJ case where that we have a cert petition for and we represent this guy Anthony Novak, who had the audacity to make fun of his local police department on Facebook and then got arrested for it. He went to court and the court found that those officers had qualified immunity. So we have a couple events. One is at Case Western Reserve University at noon on Friday, the 17th. It's free, but you need a ticket. So you can register ahead of time and we'll put a link up in the show notes for that. There will be Patrick Jaicomo IJ attorney and frequent guest on short circuit you guys should know his voice. Well, he will be on the panel, our client, Anthony Novak will be on the panel. And also our old friend at IJ. Professor Jonathan Adler will be there as well. So that's a Case Western Reserve in the Cleveland area. Then the very next day at the Grog Shop, which is a comedy club in Cleveland Heights, Saturday, February 18. At 6pm There's going to be a free comedy show, which is called comedy

is not a crime. It's gonna be headlined by local comedian, Mary Santoro, and there'll be other Canadians performing. And it'll be a good time to raise awareness about the fight against qualified immunity sponsored by Americans against qualified immunity. So if you're in the Cleveland area, we'd love for you to join us at either one of those events. And again, we'll put links in the show notes to those. Also, I mentioned before, but we'll just briefly mention it again. We have a conference right by the Supreme Court in Washington DC on Capitol Hill on Friday, March 31st. It is the 100th anniversary a conference for the case Meyer v. Nebraska came out in 1923 and led to all kinds of developments in the 20th century about the protection of individual rights. He has a slew of amazing speakers. And so if you live in the area and you'd like to come celebrate the anniversary of Meyer, please come and join us. Again, we'll put a link in the show notes for that. And if you don't live in the D.C. area, but you'd like to see it, we're going to livestream it. And then we'll also have the videos available later. Okay, finally, before we turn to our en banc panel, I don't think I've mentioned on Short Circuit before, but I may have but definitely mentioned elsewhere, that I have a book coming out later this year. It's coming out in May. It is about state constitutions and unenumerated rights. It's called Baby Ninth Amendments. And if you'd like to preorder a copy, we'll put a link up in the show notes for that. It also will be available for free when it comes out as it's an open access a publication. It's been published by the good people at University of Michigan Press. And we'll be talking a lot more about that. And state constitutions and all that stuff in coming weeks. I just wanted to mention it today. Okay, now to our headline events. So joining me today are Sam Gedge and Bob Belden. Now the last time the three of us were together on Short Circuit was just over a year ago in January 2022. And I was talking about this thing en banc. And Bob and Sam, what did you guys say about that? That phrase? Well, how did you pronounce it?

B **Bob Belden** 06:36

I think I pronounced it in bank.

S **Sam Gedge** 06:40

I thought I pronounced it and bank.

B **Bob Belden** 06:42

I mean, I definitely pronounce it in bank because I think about it every time I hear somebody say.

S **Sam Gedge** 06:50

I thought that you and I were on the opposite side of this riotous debate. But I guess there's just Anthony was out.

B **Bob Belden** 06:55

I think so with I think I said in bank and Anthony called me out and Sam came in to support me. That's the way I wrote

That's the way I wrote.

A Anthony Sanders 07:04

And I was like, I've never heard that before. And I had two people on the show both pronouncing it this ridiculous way. This very un French way, right? The French would never say in bank. And so I was like, I got a couple Hicks that I work with. But it turns out, it turns out that some of my best friends are Hicks, I should add, but it turns out that lots of people say it the way you guys do. So that got me wondering what what's up with in bank en banc. And so, I went down a bit of a rabbit hole researching the history of this term. And a very smart, summer clerk of ours last summer, Matt Liles, who is still a student at the University of Texas School of Law. So shout out to Matt and treat him kindly professors and students down there. He he did some tremendous research. And we just put it together and turn it into a quite a reverence all the references mine article about the history of this term en banc. And the kind of very long Well, not that long, but a fairly long story short that you can go read the draft of the article, we'll put another link in the show notes to that. The term kind of came out of old French, but originally it was really a German word bank, that's where we actually get the word bank in English or bench is from the same root as Germanic root. And it wasn't an old Julius Caesar, Roman Classical Latin word. It was actually imported in the Middle Ages. And it was used in law French in England. And everyone probably knows that story about the Normans coming to England and introducing French. But it was usually in banco IN not EN. And en banc is a word that they use in French today in France, they use that phrase, but the word the one we use today in America is kind of a 19th century invention. And so the long and the short of it is it's kind of a made up thing anyway. So there's really no right way to say it. So everybody is right. You're right, Bob, you're right, Sam, everyone out there, whatever you want to say about this word en banc. You're right. So it's like a John Lennon thing do your own thing where everyone's cool is postmodern. So we can all be we can all be friends again, because we're all pronouncing it correctly. But that doesn't mean that courts adjudicate en banc procedures correctly. And that's what we're going to be getting into today. We have a couple cases from the 11th circuit's and the DC circuit that one of which chose to go en banc and one of which said, Yeah, not so much. So Sam take us down the path of the 11th Circuit and why it went en banc. And in fact, it was unanimous en banc. Even though some of the judges on the panel were the on the original panel that got reversed.

S Sam Gedge 10:19

That's all correct, Anthony. And I'm glad that you ran to ground the pronunciation of en banc versus en banc and confirmed that they are both and neither of them correct. So we can kind of quickly take us on a slight detour before we talk about the elevens.

A Anthony Sanders 10:34

I think this week is all about the detours.

S Sam Gedge 10:36

So we were talking about this, like for about a second before you started recording. And I want,

I said I wanted to save this until we were talking so that we can inflict it on all of your listeners. But now that you have solved the end band quandary, I kind of wanted to raise another thing that's bedeviled me for several years, which is the kind of the difference between vacatur and reversal and Bob made some flippant comment about decretal language in our kind of prep as well. There's no laughing matter, though, Bob. Because I have just always been really confused when you're when you're kind of an appellate judge. And you have a bit at the bottom of your opinion, typically, sometimes they seem to say they reversed the district court, sometimes they say they vacate. The Supreme Court does this as well. And I don't know I haven't done a deep dive. But it doesn't seem like there's a whole lot of rhyme or reason or if there is I don't really know what it is. So I don't know, it's kind of wanted to throw it out there. See if you guys had any ideas. Anthony, you could write another article about it. The one other thing I'll say, though, is that the Second Circuit's Judge Newman, I believe, wrote an article about this at one point, which I read and don't really remember much about, but I don't remember.

A Anthony Sanders 11:48

You mean about reversal versus vacate. He also actually wrote an opinion that we cite in our article about on en banc.

S Sam Gedge 12:04

Yeah we should just have him on to talk.

A Anthony Sanders 12:07

We sit we just have Judge Newman on. I've always thought so that difference. I've pondered as well. And I'm sure that there is probably an answer to this. And some of our experienced appellate practitioner friends, we probably could have on to talk about this. I think it's that reverse is more. You got something, this point of law wrong. Or you you abuse the facts. And so you need to do it over and we're showing you how res vacatur is more there was something that affected the argument, but you're going to do it over. But it's not like you got this point exactly wrong. If you if you see the distinction. I think this there's probably something more technical to it than that. But that's the feeling I've always had.

S Sam Gedge 13:03

Yeah, that seems like a good feeling. I don't know, Bob, you can think about it while I talk about some thoughts.

B Bob Belden 13:08

Well the Newman article that you reference rattled up part of my brain that hasn't worked in a while. And I think I've read the same article that came up in a case I've litigated in a past life when a Circuit Court sent send us back to the District Court and said summary judgment

reversed. And it was sent back and there were a few things that the other side had appealed on. And we weren't really sure how bound we were by certain parts of the opinion. It was a it was a knotty issue. But like you, Sam, I can't remember exactly how it worked out.

S Sam Gedge 13:53

Yeah well, we solved that. Okay, I'll talk about 11th Circuit. So this case, involves the Prison Litigation Reform Act, I think it's of 1996, which places restrictions on the ability of prisoners to file civil rights suits. We're gonna have to go a little bit in the weeds on a kind of informal popper status and the PLRA. But I'll tell you a couple of things up front, which are kind of noteworthy one, this is a case litigated by it by our friends at the MacArthur Justice Center, and they won. So congrats to them. And two is an unusual case where the end bank decision is actually authored by two judges, Judge Jill Pryor and Judge Luck. So pretty, pretty rare phenomenon. I think I can only think of two examples. I'm sure there are others at the Supreme Court, like Planned Parenthood v. Casey, I think had a multi justice, plurality opinion and there was the joint dissent in one of the Affordable Care Act cases. So kind of rare. I'm honestly not quite sure why this particular case has two judges authoring it, but it's noteworthy So, first, I guess some background. So the general rule for civil litigation in federal court and probably most state courts is that the plaintiff files their complaint, and they have to pay a filing fee up front, I think I think it's like $400, in federal court, I might be off by that a little bit. And then the defendant responsa, and the defendant can respond on a bunch of different grounds and a bunch of different ways. But one thing that a defendant can try to do is cut the lawsuit off at its knees, by filing a motion to dismiss and say there's no jurisdiction or you failed to state a claim on which relief can be granted all sorts of things. And typically, once the defendant files that kind of motion, the plaintiff gets to respond, and they get to have their kind of their day in court and explain why their case should in fact, be allowed to go forward. And eventually, the trial court kind of hears both sides and decides who's right and who's wrong. And if the defendant is right, then the case gets dismissed. And if the plaintiffs right, the case gets to move forward. So that's kind of how civil lawsuits work, as most of our listeners probably know. But there's an exception. And I guess, an exception to that exception for plaintiffs who are too poor to pay that few $100 filing fee. And so if you can show that you're sufficiently impoverished, you can't afford the fee. Typically, you can get to file your lawsuit under what's called IFP status. So in forma pauperis status, some more law Latin, which means as a general matter, that you can get into the court without paying that $400 for a $450 fee. So IFP status has been around for over a century. And the basic idea is that we don't want people being unable to vindicate their rights in court simply because they can't afford to pay the filing fee. So there's the sense that we don't want poor people being shut out of the courthouse. So there's also a concern, which is, I guess, a little bit in tension with that, that, well, we don't want poor people getting shut out of the courthouse. You know, there's this concern in certain sectors that we kind of do want to keep prisoners out of the courthouse, at least if their cases are, you know, frivolous or a burden on the justice system. I think their concern is that no, lots of prisoners don't have a lot of money. So they would ordinarily qualify for in forma pauperis status. Lots of prisoners have a lot of time on their hands. And if they don't have to pay the filing fee, the concern is that there is no real disincentive to them filing endless lawsuits that that will clog up the court system. And at least potentially, kind of distract from the prisoner litigation that actually is meritorious. So those are the concerns whether they're right or wrong. So Congress sought to address them in 1996, bypassing the Prisoner Litigation Reform Act, which did a few things. One for prisoners, specifically, it continues to allow IFP status, but it doesn't actually waive that filing fee. Instead of saying, you know, you can file your case without ever paying that multi $100 fee. It says, Well, if you're a prisoner, you don't have to pre pay. But you're going to kind of have to pay on

an installment plan until the end of time. Another thing that PLRA did was that it required prisoners to exhaust all of the internal prison grievance procedures before they go to court and sue to vindicate their rights. And another thing it did is that it created a kind of three strikes mechanism, which is really at the heart of this 11th Circuit case that we're going to talk about soon, I promise. So under the three strikes provision, if on three or more prior occasions while you the plaintiff have been in jail, if you've had a lawsuit dismissed on the grounds that it's frivolous, malicious, or that it fails to state a claim on which relief can be granted. If you've had three of those dismissals while you've been in prison, you're almost categorically ineligible for IFP status going forward. So if you want to file any more cases, in federal court, you have to pony up the $400 filing fee on the front end, then you don't get to be on this this kind of payment plan. So that's kind of a lot of background. But basically what happened in this 11th Circuit case, is there is a man who is in prison, he filed a lawsuit under Section 1983. So you can to vindicate various of his civil rights. And he has a history of having filed lawsuits in the past. He's had three dismissals in the past. And so it raises this question of okay, well, are those three prior dismissals, strikes, such that if he wants to file this fourth lawsuit, he has to somehow cobbled together a few 100 bucks to pay the filing fee. I'll just kind of know parenthetically that one of the one of the many downsides, not many downsides, a downside of the prison litigation Reform Act Three Strikes provision is that it invites judges to make all kinds of like baseball puns, and this case is no exception. So I mean, I guess it's kind of built into the three strikes nomenclature anyways.

A Anthony Sanders 19:58

This got me thinking that if baseball rules were different, or we had a different national pastime, all kinds of areas of our law would would would be different than they are today. I mean, it's like three is the it's the Holy Trinity. Right. But it's because of baseball.

S Sam Gedge 20:15

Yeah, there's a lot to be said for that. Yeah, absolutely. So anyway, so he has these these three prior cases. And the district court said, yeah, all each of those qualifies as a strike under that statute that says if prior cases are dismissed as frivolous or malicious or failure to state a claim on which relief can be granted, then then you've kind of struck out to kind of buy into the the baseball puns. But the 11th Circuit on appeal that no the first time around, no really kind of struggled briefly with one of them because there was one of these three cases previously that undisputedly qualified as a strike. Yet one of his cases dismissed for failure to state a claim on which relief can be granted it's a paradigmatic strike. There was another one that was kind of a little bit closer. And then there was a third one, though, we're things got kind of tricky, because his third case that got dismissed, was dismissed, not at the motion to dismiss stage, but as summary judgment, and it was dismissed for failure to exhaust, which is kind of a non merit-sy kind of ground. So he argued that that prior case, in fact, didn't qualify as a strike within the language of the PLRA. And he also argued that one of the other two didn't either. And, on the first go around the three judge panel, in a very perfunctory opinion said, Well, we said pretty much the opposite a couple of years ago in a prior published panel decision, and we're bound by that, and there's not really much that we can do. And at that point, the the plaintiff files a petition for en banc review, or on en bank some call it, Anthony. And that's when things kind of got just kind of generally unusual. And I'll flag a few of them. One, no, because many of these prisoner cases are dismissed before defendants are even served. In fact, at the at the panel

stage, nobody had even shown up on behalf of the government to file an appellee's brief. So he filed his opening appellants brief and the panel just said, Nope. And he filed his petition for rehearing. And there's still really nobody on the other side of the V. So they actually I was I was skimming the docket when you were when you were talking earlier. Anthony, it looks like they actually granted the petition for a hearing without the government ever having said a word in the case, at least on appeal. And so they just sent a letter to the Georgia AG saying, well, since we granted rehearing, maybe maybe if you want you can kind of come in and argue.

A Anthony Sanders 22:38

Was he actually represented but with the en banc petition.

S Sam Gedge 22:43

Yeah. So it looks like the MacArthur Justice Center represented at all stages, at least on the appeal. And they know what the dynamic was at the that's Yeah, at the district court race, which which which raises kind of another thing we can talk about for like a third or fourth rabbit hole about kind of this this phenomenon of just sua sponte dismissals in the PLRA context, which is something that that reasonable minds can think is a is a questionable idea. But anyway, so the Georgia Attorney General finally shows up and eventually the whole court and bank decides this kind of esoteric question about whether dismissal for failure to having failure, failure to have exhausted your internal grievance processes, whether that's the kind of thing that counts as a strike, for purposes of potentially kicking you out of this this IFP status. And they ultimately said sometimes, but not in this case, and we don't need to kind of go into the weeds on it a whole lot. But their idea was, exhaustion is an affirmative defense typically we don't view affirmative defenses as being fodder for dismissals at the motion to dismiss stage where you're accepting all the complaints allegations is true. But there are certainly cases where kind of the an artful plaintiff can somehow managed to, to plead affirmative defenses in their complaint. And if you're kind of in artful enough to do that, and sure, maybe your case can get dismissed, and maybe it can be a strike. And honestly, it's all kind of complicated, and it's not, not really what makes this case all that interesting to me, at least. So if you're if you're really interested in the esoteric of the PLRA, it's a pretty short opinion. But the court was unanimous in agreeing that, you know, that this guy didn't in fact, have three strikes and that he could go back down and he doesn't have to pay this kind of, for him presumably prohibitive filing fee and can proceed in the lower courts and try to vindicate his rights. But that's kind of the bottom line, but it kind of sparked some kind of interesting thoughts or thoughts that were interesting to me about these kind of weird peculiarities of the prison litigation Reform Act, because it kind of built into the system. Is this what's called like a pre screening requirement? Congress was so concerned about government officials, you know, being burdened with having to just show up and respond to what the legislators thought was this overall Like flooded frivolous litigation, that just baked into the system is the idea that when a prisoner files a complaint and seeks deferred payment of the filing fee, because they can't afford to pay it district courts have this obligation to kind of pre screen the case before, I think before it's even served on the government to to figure out is this a case that is frivolous or malicious, or whether it even fails to state a claim? And that's kind of commonplace. I mean, you'll see just hundreds of these really short district court decisions coming out on a monthly basis nationwide, where you basically have the district court almost stepping into the shoes of the government, which has always struck me as kind of an unusual state of affairs, because you

see, these situations where the district court just like, has only one party in front of them just has the complaint. And they're just dismissing the complaint. And they're doing it by basically creating arguments for why maybe some immunities apply, or why there are certain defects in the complaint, basically, kind of doing the government defendants work for them and not even requiring the government to show up.

A Anthony Sanders 26:03

And something the court noted was there's this form, or is one of the concurrences noted that where you check a box, and often it's on the basis of whether I think the box is whether they filed it before, and it's confusing to the prisoner, which boxes even check. And yet that can be one of these strikes against you as well, if you check the wrong box.

S Sam Gedge 26:25

Yeah that's exactly right. And that just goes into kind of what a quagmire this is because the Supreme Court has said that prisoners do not have to affirmatively plead in their complaint that they've exhausted all of their internal prison remedies. That's an affirmative defense that the government can come in and raise if they want to, just as they might with any other affirmative defense. But despite that, you have a lot of district courts, as the concurrence here pointed out, that kind of do require prisoner plaintiffs to affirmatively plead exhaustion as part of their their opening case packet because they say if you want to file up, if you're a prisoner, you want to file a complaint and seek in forma pauperis, you have to fill out this form and check the box saying whether or not you exhausted your internal remedies? And it turns out, that's actually a pretty hard question. Because there's a decade or more of Supreme Court case law that makes everything complicated, even for lawyers. And how are we supposed to expect these typically pro se prisoners to figure that out and kind of distill that into whether you check a yes or no on a box that might end up meaning that you get your case dismissed before the government even shows up to defend themselves? So no, it's all kind of a mess is kind of kind of my take on it, Anthony. And the whole concept of district courts being required to kind of step into the government shoes and presumably go through a checklist of reasons for dismissing someone's complaint, to a degree you sympathize with, with the courts, because there are a lot of prisoner lawsuits. And there's obviously a temptation to try to process them in a streamlined fashion that lets the courts focus on cases that in many cases might have more merit. But this is a gut level, it feels kind of strange that you have the court kind of almost creating defenses for government, government defenders, who aren't even required to show up in the first place.

A Anthony Sanders 28:08

Now, Bob, you worked on a federal appellate court in your clerkship? Or were you a big fan of PLRA cases when they came up, and you had to look through the materials?

B Bob Belden 28:21

You know, I don't think one ever came to me, I think our work distribution must have been different from most chambers. So I was not that familiar with IFP or the field.

A Anthony Sanders 28:36

Well often right, discuss this kind of case, and maybe some other types of routine appeals, like it may be Social Security Appeals, those kinds of things are dealt with by a career clerk, or the clerk's office is my understand. So the judicial clerks maybe don't get in the weeds of this stuff as much, which was that may be true at the Fifth Circuit.

B Bob Belden 28:58

I think it it could have been we didn't have a career clerk, but there may have been sort of a central intake thing for it. But it's also possible that my judge, Judge Smith was, had a tremendous capacity for work. And extremely bright guy, he might have been, you know, he might have been plowing through them when we weren't watching so that could be.

A Anthony Sanders 29:24

Well while Sam was giving this brilliant overview of the case. I actually did a little live research, as they, as they say, on The Rest is History Podcast, shout out to those guys. And I found judge Newman's article, and it looks like from that and a couple other sources, this there is in fact no, like really bright line answer on what is a reversal and what is it vacatur But no, Judge Newman says that there are a few areas where it's fairly bright. So one is if there's if You ordered the complete opposite of what the district court ruled. That is reversed. If you reject interim relief, like a preliminary injunction is a court of the judge Newman, that's vacated. And then if you'd reject a sentence in a criminal sentencing case, that's vacate because the sentence is vacated. And then it gets superduper gray after that.

S Sam Gedge 30:30

I kind of looked at this a little bit one time, because I was trying to figure out kind of what do we put in the conclusion of a brief. I think we went with reverse because it feels like more of a thing than vacatur. So kind of ask for ask for the most. But I ran across like a bunch of these, like personal jurisdiction cases from the Supreme Court, right, where the lower courts say, No, there's no personal jurisdiction, and you're kicking the case. And when the court the Supreme Court has reversed or whatever, when the Supreme Court is taken those cases like seems like sometimes they say that the lower court decision is vacated, and sometimes they say is reversed, and I couldn't make out really any, any rhyme or reason. Which isn't to say there isn't rhyme or reason, but it wasn't obvious to me.

B Bob Belden 31:06

So I had just one quick question about this. I don't know if either of you spent a lot of time with the the underlying panel opinion. But I was sort of confused about how this case sort of came to be in an en banc procedure when the third ground that we're talking about here under the IFP statute is dismissed for failure to state a claim. And the panel opinion was presented with a

situation where this guy lost on summary judgment. So like I'm thinking dismissed for failure to state a claim is, I mean, that in common parlance, that means A 12b6, this dismissal, not a not a summary judgment decision. So I was, I was sort of surprised to find that the panel thought it was bound by this case from 2020, that actually addresses a dismissal on the 12b6, context. And so I don't know if either of you has any insight into why this wasn't just a straightforward. Summary Judgment is not a dismissal for failure to state a claim for relief. I'll I could be wrong about that, though.

S Sam Gedge 32:16

I think you're right. And I feel embarrassed that I don't have the answer. I could just, I could kind of read through the panel's opinion more closely.

A Anthony Sanders 32:24

But I definitely don't have the answer, I did get the sense that these these strikes, these possible strikes are broader than just kind of a pointing to a technical rule. And so there's, there's more to it than that than just 12b6. But this, the specifics are, are hard to grasp. But that we're we're giving you enough to grasp here on Short Circuit, and our listeners are much smarter than myself and our panelists. Sometimes you can, you can go, go figure that out, we've given you enough to get started on. So Bob is going to also give you enough to get started on for some immigration questions. And it keeps coming out of the D.C. Circuit. And what happens when someone comes to this country and is a student, but then wants to stick around and get some work done, and whether that's part of your studies. So Bob, what happened in this case?

B Bob Belden 33:35

So thanks, Anthony. Unlike Sam's case, I have the very easy INA statute to kind of wade through and it was a good time. This case is sort of as Anthony teed up, it's at bottom about the relationship between the conditions of entry to the United States, which are determined by Congress in the INA.

A Anthony Sanders 34:05

For our non immigrants and non lawyers, the Immigration and Naturalization Act.

B Bob Belden 34:12

That's right. I think maybe originally 1924, and renewed a bunch of times and edited since then, but it's about the relationship between those conditions of entry and the, for lack of a better term, the conditions of remaining in the country and the first stuff is set by Congress in the INA. The conditions of remaining are sort of broadly speaking, delegated to the DHS, Department of Homeland Security and its secretary. So this case is called Washington Alliance of Technological Workers v. DHS and we're talking about a denial of en banc rehearing and so

at bottom are sort of underline this case is the f1 Student Visa Program that allows you to come and be here for a temporary time and solely for the purpose of following a course of study. And in March 2016, DHS promulgated a regulation, specifically for students in the STEM area. So science, technology, engineering and mathematics that said, even when you are done with your course of study at a university, here in the United States, you can stay for up to three years and work in a related field. And the theory was staying and working for another three years as a sort of practical occupational training that you might tuck in to the otherwise otherwise clear language course of study and student. So, a union of technological workers who were upset that these highly skilled foreign students in the STEM areas were allowed to stay in the United States and compete with them. This union brought a lawsuit claiming that the regulation was beyond DHS is delegated authority. And they lost at trial, or I'm sorry, they lost at the trial court. And before the D.C. circuit panel, appealing a summary judgment ruling for the government. There's a complicated procedural history related to standing it goes up and down a couple times. But broadly speaking, the panel upholds the district court because the Secretary has authority to set the the the time and conditions of these non immigrant visa holders to their stay in the United States. And that includes, for purposes of the f1 visa statute and the program. The the Secretary has authority to allow these students to stay for reasonably related employment. Judge Henderson was on the panel and dissented because in her view, the words student and course of study are pretty clear. In the INA, once you graduate from a college in her view, and I think, share this view, once you once you graduate from college, or whatever graduate course you're studying in, you sort of you cease to be a student. And once you start working for a year or two years or three years, you're not in a course of study anymore, you're now an employee or worker. And so because Congress in the INA has said, this group of non immigrant visa holders is allowed to come into the country only or solely for the purpose of studying and solely as students. They have to meet both of those qualifications for the entire time that they're in the United States. And so, to the extent the secretary can set other conditions of their stay, they have to be sort of within those broader category or the broader conditions of entry, you have to be a student. And you have to be here solely for a course of study. After the panel issued its opinion, the D.C. Circuit considered but denied a request that the case be reheard en banc and Judge Henderson, dissented from the denial of en banc rehearing and essentially incorporated her entire dissent by reference and then Judge Rao also issued a statement dissenting from the denial of rehearing en banc.

A Anthony Sanders 39:33

Was that statement, Bob, a decentral?

B Bob Belden 39:40

I actually don't know that I understand the difference between a dissent and a dissental.

A Anthony Sanders 39:46

I don't think it usually says decental. In like statements on denials of en banc with dissents. But I have heard that word. In fact, I think it was a Short Circuit a couple years ago. It was For I first heard it and I was like that's made up. And then I realized lots of people use this word dissental

mean most words, which must have some genealogy to it, I don't know. But I think it is a real word that real lawyers actually use.

B Bob Belden 40:16

That might be another one for us to crowdsource with the with the listeners, maybe. I mean, you gotta come up with like a loyalty program where the more of these problems your listeners solve, they get some prize.

A Anthony Sanders 40:28

Well we'll have a prize to the first listener to write in and say where decentral comes from.

S Sam Gedge 40:37

I had like a vague recollection that might be wrong, consistent with most of what I've been saying, this episode, which I think that former Judge Kozinski may have coined, but I have this kind of foggy recollection of that maybe being a thing from maybe 10 years or so ago, but doubtless, our listeners are better informed.

A Anthony Sanders 40:57

So Bob, whatever you call this thing, Judge Rao. She did not agree. And and agreed with Judge Henderson, you were saying?

B Bob Belden 41:06

That's right. Yeah. Judge Rao raises a number of issues with the majority's opinion on the panel and the refusal to rehear and bank. I mean, she agrees with Judge Henderson, it seems that the INA is, is pretty clear that people who come in under the f1 program, they have to be students, and they have to be here solely for a course of study and that the DHS is regulation sort of jettison those conditions of entry and opens the door, opens the door for the DHS to kind of look at each one of these different categories of non immigrant visas, and essentially expand them beyond recognition. If you were to look just at the text of the statute, that Congress had enacted in a kind of an interesting part of the dissent is her reference to the the Supreme Court's recent opinion in West Virginia v. EPA, saying you can't, you can't infer from Congress's like, extremely, extremely detailed provisions in the INA that by saying students here solely for a temporary time and solely for a course of study was a sort of implicit delegation to the DHS Secretary to allow those people to stay when they were no longer students and no longer actually engaged in a course of study. So that that sort of dropping in West Virginia v. EPA might be a call to the big Court to hear this case. With a properly placed cert petition. She also points out that D.C. Circuit precedent already requires the result that that Judge Henderson and she support, and that instead the panel opinion had relied on a Third Circuit opinion that that's obviously not binding. She points out as well, that I don't think any judge likes to wind up on the short end of a lopsided circuit split. But she points out that the D.C. Circuit is now in that

very position, and that they did not need to be. And finally, I think the kind of the really interesting thing to me, about this opinion is near the end, after the kind of the three stars when when Judge Rao is closing up, she points out that this very well might be good policy to to allow more STEM graduates to stay in the United States longer and to work and to pay taxes here. But good policy is not not exactly the the end goal for an Article Three judge. I mean, the obligation here was to look at the text of the statute and say, has the statute delegated this kind of authority to the Secretary to this agency. And as she points out the the reasonably related limitation, like saying, DHS can extend the time or the conditions, so long as they are reasonably related to the original conditions of entry is kind of unlimited, it's it's hard to see a meaningful limit on that. When you look at all the different categories of non immigrant visas, like one of the one of the examples she pointed out are agricultural workers who fall into a number of bucket In the last one is a non immigrant who is working, pressing apples into cider on a on like an apple orchard or at like a farm or something. And so you can you can imagine like if that person that non immigrant comes in under an h1 B visa and is pressing apples into cider can can DHS say? Well, we're actually going to start a program for all non immigrant visa holders who are pressing apples into cider. They can stay in perpetuity if they open a cidery. You know, because that's reasonably related. And we have plenty of craft breweries and distilleries, but cideries are not really, they're not really thriving in the United States, like we'd like to see. So we're gonna let these folks stay and open their cideries. Like, is that reasonably related apples are being pressed into cider in both areas? That is not something that's in the opinion, it's just something I thought about when I read it. But that's how she closes up. And I, I think it's an interesting tension in this case, we think it would be good to have these folks here if we need more people in STEM jobs. But this isn't necessarily the way to get that done. So that was the dissent or the dissental, whichever you prefer.

A Anthony Sanders 46:29

Sam, do you tend to take much much stock of dissentals?

S Sam Gedge 46:36

Like the term? I like Bob, I don't love the term. And it feels like it's a portmanteau except it's not actually conjoining to separate words. I don't I don't quite understand where it comes from. But I guess I guess your listeners will tell us at some point, or maybe they won't, we can figure it out ourselves. As for substance, I know I don't really have a strong strong feelings on it. If I recall, wasn't there like a bit of a spat in the Ninth Circuit a couple of years back a lot of going back and forth about some judges were getting kind of fired up because they thought some of their colleagues were basically like using this decentral mechanism to basically like kind of like write litigants cert petitions for them. So it seems like it's certainly been a bit of a hot topic, and at least some circuits recently. I had one other thought related to this, which I'd welcome your guys insights on as well. I honestly thought it was a little bit unusual that Judge Henderson kind of had that one paragraph, I'll use dissental just as a shorthand, but that she had that one, paragraph dissental that basically incorporated by reference her actual panel dissent. I've never I don't know that I've ever seen that before. And it struck me as unusual for a couple of reasons. One, I thought that at least in some circuits, there was there was some kind of tradition that if you were like the panel, dissenter, you wouldn't register your dissent from an en banc denial. The idea being that well, that kind of goes without saying, because I wrote that dissent to the panel. I'm not sure if if that's a commonplace thing, or maybe I just imagined it.

But the other thing that struck me is kind of unusual is kind of what was the point of, of doing that? Right? I mean, it's not like she had to preserve her arguments. Usually she's the she's a judge, right? She's not a litigant. And all of her views were all already stated in the in the panel dissent. So I don't know, I assume that there was a reason for her doing it. I just had never seen it before. And it struck me as kind of unusual. And the reason for it wasn't obvious.

A Anthony Sanders 48:27

I don't know if I've seen it exactly this way. We're really that's as you said, That's all she said. But I think judges in often in en banc. denials of petitions en banc will say I still dissent if they dissented in the original panel opinion. Or just register like, Judge Smith dissents from the front of the denial. Maybe we if they don't want to have a further statement, but I think a statement of some kind is is common sometimes, they might add a little bit even to their original dissent. But it does I think it does depend on the circuit which which brings up another point to note for those listeners who remained with us and are fascinated by en banc procedure. It really does vary amongst the circuits right how often they go en banc. I think the D.C. Circuit historically it's been quite unusual. I think it's a little more usual lately as it's a more divided court but it's been unusual. The Ninth Circuit does it all the time and has this crazy math where you have 29 Full judges on the court and only 11 Here petitions en banc so it's always like a lottery as to whether you're gonna get get en banc and then get a reversal if you do go en banc. So you can see there's an incentive in the Ninth Circuit that maybe isn't there in other circuits. The Fifth Circuit, I think goes a fair amount. Right? If you I mean, just anecdotally, it seems like they definitely go on en banc a fair amount, the 11th Circuit like we like Sam's case. But the Second Circuit, I guess, hardly ever go. I mean, it's very rare. I'm not saying never, but like compared to other circuits is quite rare and they just had a denial of en banc the other day that split six to six. And so that means it doesn't go en banc, because there was no majority that wanted to with a statement, it was a religious liberty case. But it was, it was quite unusual, I guess that there was this split in this statement. And so a lot of this just isn't important for litigators to keep in mind, a lot of this just comes down to the culture of that particular set of judges and their staff. And that really can vary in different circuits.

S Sam Gedge 50:50

Yeah, isn't isn't it the case, I had understood that. In the Second Circuit, maybe a few other circuits, there was this kind of like informal, behind the scenes kind of polling of judges, like if you're on a panel and you want to overrule a prior panel decision, instead of kind of going through the whole end back process, you kind of just like, send it to all the other judges emailed to him and say, Hey, you guys, okay with us overruling this case? And, and I think like the Seventh Circuit actually has like that, that is codified by rule in their local rules. But my understanding is a few other courts kind of do that in a more informal way. So maybe that explains some of the difference between the number of cases they're actually formulating ien banc.

A Anthony Sanders 51:31

I think that's probably right. And that that in informal process definitely is true. And in state courts, too, like, for example, the Minnesota Court of Appeals, which does not have an en banc process, but it does have a fair amount of judges, and they only sit three judge panels, I think

it's about 15. Judges, they if they publish opinions, and then they have unpublished opinions, and very few published opinions, and only published opinions are considered to be precedential. And if they have a published opinion, they will actually pass it around to other judges and say, not like, do we have a full majority for that. I don't think it's that like formal, but it's, it's, Hey, are you super uncomfortable of this kind of thing. And so they get a little bit of at least have a consensus, whereas unpublished they just, they just keep it those three judges. And so there's a little bit of that, in in a lot of groups of appellate judges that that work that way, even if it's not codified. Well, I'd like to thank everyone for going en banc or in bank, or whatever your cup of tea is with us today. Hopefully, you've learned a few things. You have quite a lot of links in the show notes more than usual, that if you want to go down some of your own rabbit holes, but we're always here to take you down rabbit holes of our own, and I really appreciate getting this band back together and in burying the hatchet on the en banc controversy. So thank you, Bob. Thank you, Sam. Thank you everyone for sticking with us. Happy Valentine's Day. I hope all the listeners get can share some love and share some love for the Circuit Courts of Appeals, and the Short Circuit, podcast and newsletter. And until next time, though, I hope you all get engaged.